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NO. 1056

In the Supreme Court of the United States

OCTOBER TERM, 1941

CHESTNUT SECURITIES COMPANY, a Corporation,
Petitioner,

VERSUS

OKLAHOMA TAX COMMISSION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

F. M. DUDLEY,
Counsel for Respondent,

A. L. HERR,
C. D. STINCHCUM,
Of Counsel.

Address:
State Capitol,
Oklahoma City, Oklahoma.

March, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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STATEMENT OF FACTS

(Italics Ours)

There is involved in this action the validity of an income tax assessment made by respondent against the net income of petitioner for the years 1936, 1937, and 1938. The income consisted of interest derived from certain notes and bonds, dividends on corporate stocks and profits derived from the sale of stocks. The assessment was made under Article 6, Chapter 66, Session Laws of 1935. The sections of this Act material to consideration of the question here involved consist of Section 5, and particularly subdivision (b) thereof, and part of Section 6.

Section 5 provides:

"The term 'property owned,' as used in Section 6, shall, for the purpose of this Act, include the classes

of property hereinafter enumerated in this Section, and a taxable situs within the State of Oklahoma is hereby declared to exist with respect to the following:

"(1) All obligations (or other evidences of debt), whether owned by a resident or by a non-resident, when the same are secured by mortgages or liens upon real or tangible personal property located within this State, including bonds of the State or of its municipal or political subdivisions; and, when owned by a resident.

"(2) All unsecured obligations (or other evidences of debt), all obligations or debts secured by mortgages or liens upon property located here or elsewhere, all stocks in any corporation and bonds of any State or municipal or political subdivision thereof.

"(b) *The term 'resident,' as herein used, refers not only to a resident individual, as defined in Section 4 (j), but, in addition, refers to and includes any corporation whose principal business is carried on or transacted in Oklahoma. Such a corporation shall be deemed to be a resident of this State, for income tax purposes, and its income shall be determined, and the tax thereon collected and paid, as if it were incorporated under the laws of Oklahoma, notwithstanding its corporate domicile is elsewhere.*"

Section 6, in part, provides:

"(a) A tax is hereby levied upon every person as defined in Section 4 (b), which tax shall be collected and paid, for each taxable year, upon, and with respect to, the entire net income of such person, which is derived from all property owned and/or business transacted within this State. And a like tax is hereby levied upon every person as defined in Section 4 (b), which tax shall be collected and paid, for each taxable year,

upon, and with respect to, the entire net income of such person which is derived from all property owned partly within and partly without this State and/or business done partly within and partly without this State (commonly known as interstate business), such income derived from property owned partly within and partly without this State and/or business transacted partly within and partly without this State, upon which said tax is hereby levied, to be determined or allocated under the formula or formulae as provided in Section 8 of this Act. Every resident individual shall likewise be subject to the tax hereby levied upon the entire net income of such individual, derived from wages, salaries, commissions, professional or occupational earnings or other compensation received from personal services."

Petitioner is a Delaware corporation which received its charter in Delaware on the 2nd day of December, 1931, and was first licensed to do business in the State of Oklahoma on the 28th day of December, 1931. On January 1, 1932, it acquired, in exchange for its capital stock, securities consisting of stocks, bonds, notes and certain real estate consisting of a small office building situated in Tulsa, Oklahoma. It acquired these securities after it was qualified to do business in this State.

Petitioner thereafter, on December 31, 1933, sold its real estate situated in Tulsa, Oklahoma, and until October 21, 1936, possessed no property located in the State of Oklahoma, and permitted its license to do business in Oklahoma to lapse. In October, 1936, it again acquired certain property in Oklahoma, consisting of oil and gas royalties, and

again applied for and was granted permission to do business in the State of Oklahoma.

During the years 1936, 1937 and 1938, in making its income tax returns to the State of Oklahoma, it did not return for taxation any of the income derived from these securities. It, however, did pay all income taxes derived from its mineral properties in the State. The respondent, Oklahoma Tax Commission, refused to accept such returns and assessed income tax against petitioner on the income derived from such securities in the amount of $3,675.58, which tax petitioner paid under protest and brought its action to recover the amount so paid.

During the years here involved all of the stockholders of petitioner were citizens and residents of Tulsa, Oklahoma; all of the members of the Board of Directors were residents of the State of Oklahoma, and all of its meetings were held in the City of Tulsa, Oklahoma; its main records were kept at Tulsa; all of its business was transacted under the direction of its Board of Directors, meeting and sitting at Tulsa, Oklahoma, no meetings of its Board of Directors having ever been held at any place other than at the City of Tulsa, Oklahoma. None of the securities held by it could be exchanged or sold, nor could any securities be purchased in any manner, except by authority of the official management at Tulsa; all of its officers resided in Oklahoma, except one assistant secretary, who was a resident of Wilmington, Delaware.

This assistant secretary was a part-time employee who was paid $25 a month. His duties included the reception

of income derived from intangible investments of the corporation and the depositing thereof to its bank accounts, and the making of original entry of such receipts on the books of the corporation, and furnishing a copy of such entries to the secretary and treasurer who resided in Tulsa, Oklahoma. He also had custody of certain physical evidences of the intangible investments of petitioner, the safekeeping thereof, and the delivery of such of the same as were sold, and the depositing of the proceeds therefrom in such banks as were designated by petitioner.

He, however, had no authority to draw checks upon any of the corporation's bank accounts, nor had he authority to purchase any securities or property of any kind, or to dispose of any of the assets of the corporation. The funds derived from these investments, as well as from the sale of the securities, were deposited in banks outside the State of Oklahoma, but checks upon said accounts could only be drawn on the order of the Board of Directors, issued at Tulsa, Oklahoma. All sales and purchases of securities made by petitioner during the years here involved were executed upon the New York Stock Exchange by and through brokers employed for that purpose, and delivery of the intangibles bought and sold was made at the City of New York and payment was in such instance made there. Such purchases and sales, however, could only be made on authority issuing from the management in the City of Tulsa, Oklahoma.

No part of the securities here involved were purchased from income accruing from petitioner's Oklahoma min-

eral properties, but the mineral properties of petitioner held in Oklahoma were purchased out of income derived from the proceeds of such securities, which securities were owned and held prior to the acquisition of such mineral properties.

This, in substance, constitutes the facts as set forth by the trial court (Tr. 23-28). From these facts the trial court arrived, among others, at the following conclusions of law:

That the securities here involved, and the income derived therefrom, acquired a "business situs" within the State of Oklahoma, and the defendant, Oklahoma Tax Commission, had the right to assess an income tax on such income (Tr. 28).

That plaintiff's principal and main business was transacted at Tulsa, Oklahoma.

CONTENTIONS OF PARTIES

Respondent contends, under these findings:

1. That petitioner's principal business is carried on and transacted in the State of Oklahoma and is, therefore, under subdivision (b) *supra*, deemed to be a resident corporation and taxable as such;

2. That income was derived from business transacted within the State of Oklahoma and the State, therefore, has authority, power and jurisdiction to collect an income tax on such income.

Petitioner contends:

1. That petitioner's main business was not transacted in the State of Oklahoma and that subdivision (b) of the statute, *supra*, is therefore, not applicable;

2. That if applicable said subdivision of the Act is unconstitutional and contravenes the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States;

3. That the tax is invalid as laid upon income derived from sources without the State.

The trial court found these issues against petitioner and its judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit.

ARGUMENT

Petitioner transacted its principal business in Oklahoma during the years in question and, under subdivision (b) *supra*, it is deemed to be a domestic corporation and its income is taxable by the State as such.

It appears clear to us, under the record in this case, that no other conclusion can be reached except that petitioner's main business, during the years in controversy, was transacted in the State of Oklahoma. Its stockholders all reside in the State; all the meetings of its Board of Directors, during said time, were held in the City of Tulsa, Oklahoma; its seat of government was there located; it there functioned; all the transactions incident to acquiring the securities here involved, and all the transactions incident to producing the income here in question took place at Tulsa, Oklahoma. It is, therefore, clear that its principal

business was there transacted and, under subdivision (b), *supra*, such income is taxable by the State of Oklahoma.

Petitioner, however, contends that that section of the Act is unconstitutional in that it violates the Fourteenth Amendment to the Constitution of the United States. In support of this contention the case of *Newport Company* v. *Wisconsin Tax Commission*, 219 Wis. 283, 261 N. W. 884, Certiorari denied, 297 U. S. 720, is cited. This case sustains the contention of the petition. Notwithstanding this decision, however, we submit there is sound reason and authority for sustaining the validity of the Act. It occurs to us that when a foreign corporation enters a state and chooses such state as its commercial domicile and there transacts the major portion of its business the state has authority, under the Constitution, to declare that such corporation, for purposes of taxation, shall be treated as a resident corporation. Surely when a foreign corporation enters a state, seeks permission to transact business there and chooses to make such state its seat of government, and there function as a domestic corporation, a state has authority to say that such corporation shall, for purposes of taxation, be deemed a resident corporation and taxed as such. We think the case of *Commonwealth* v. *United States Cigarette Machine Company*, 119 Va. 447, 89 S. E. 935, is somewhat in point. While the statute there under discussion is not identical with the Oklahoma statute, it is, in some respects similar and what is said by the Court in that case is applicable to the facts here involved. The gist of the opinion is stated in the headnotes and is as follows:

"Code 1904, sec. 1103b as amended by Act Feb. 14, 1912, entitled 'An act to enable certain mining and manufacturing corporations of other states and countries to conduct operations in the States' confers on such corporations in the body of the act the right to carry on their business within the state, but subjects them to the state laws, which include state tax laws. HELD, that the provisions of the act are germane to the title.

"Those provisions in the act declaring that foreign corporations shall be treated as domestic corporations do not render the act invalid on the theory that it violates Const. sec. 50, requiring a law imposing a tax to specifically state such tax, for the act does not impose a tax, but merely authorizes foreign corporations to do business in the state subject to the same rules governing domestic corporations, *including the assessment of taxes.*"

In that case there was also involved the question ot the right of the state to tax certain intangibles. The Virginia statute provides that all foreign corporations receiving a permit to do business in the state, and upon entering the state, shall, for all purposes, be deemed resident corporations. The state there, as here, first contended that the intangibles had acquired a business situs in the state for the purpose of taxaticn, and second, that if they had not acquired such situs, they were nevertheless taxable under this provision of the statute.

The Supreme Court, after discussing the "business situs" rule and indicating that the intangibles had acquired a business situs, proceeded to discuss the validity of this statute and, in sustaining the same, in part, said:

"This act was first passed as chapter 43 of the Acts of 1889-90, p. 33, and has been twice amended, but these amendments need not be specifically mentioned, as they are not material to the issue here. The title of the act as amended (1912, *supra*) reads as follows:

" 'An act * * * to enable certain mining and manufacturing corporations to conduct operations in this state.'

"And the act provides:

" 'That corporations chartered or organized under the laws of other states or countries and authorized to manufacture iron, steel, or other metals, or any articles or material made from metal, wood, cotton, or wool, or to mine ores or coals, may carry on in this state the business authorized by their respective charters or by the articles under which they are or may be organized; and for this purpose may purchase, acquire, lease, sell, mortgage and convey real estate in fee and any other * * * lands or personal property of every kind suitable for their business.'

"In addition it is provided:

" 'That every such corporation desiring to carry on its business in this State shall first comply with the provisions of Section 1104 of the Code of Virginia, and as to its contracts made, property located, and the franchises hereinunder exercised within this state *every such corporation shall for all purposes be deemed and treated as a corporation of this state and be subject to the jurisdiction of the courts thereof.*'

"And the act concludes:

" 'All taxes, dues and demands that may become due to the state of Virginia shall be paid in lawful money of the United States and not in coupons.'

"The testimony given by Gerow, chairman of defendant in error's board of directors, is that the materials of which the machines manufactured by the company consist are iron, steel, brass, aluminum, wood, linen, and in some instances velvet or plush and leather, and that the principal component parts are metal, thus bringing the machines manufactured by this company, as it would seem, clearly within the provisions of section 1103b, *supra*.

"It has to be borne in mind, when the statute in question comes to be construed, that it would have been entirely competent for the commonwealth of Virginia to have denied foreign corporations authority to engage in mining or manufacturing in this state (*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. ed. 657; 19 Cyc. 1251); the state having the power to exclude a foreign corporation from so acting unless it fulfills certain prescribed conditions (*Paul* v. *Virginia*, 8 Wall. 181, 19 L. ed. 357).

"We have cited above ample authorities to sustain the proposition that, where a foreign corporation has an agent within a state by whom investments are made, who collects and transmits them to his principal the 'credits' have a situs within the state, and the state has a right and the power to tax them.

"The authorities cited by counsel for defendant in error show, we think, *that while a statute may not make a foreign corporation a 'citizen' within the meaning of the Federal Constitution, the same statute may domesticate a foreign corporation for purposes of taxation;* and it is well established that:

" 'Instead of merely licensing a foreign corporation to operate a railroad, or to transact any other business within its borders, a state may, for reasons of its own, adopt the foreign corporation by creating it a

domestic corporation with the same franchise and powers that it exercises in the state which originally created it, or with powers that are less or more extensive.' *Missouri Pac. Ry.* v. *Mech.*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; Beale on Foreign Corp., sec. 773.

"Whether the second state has chosen to do this in any particular case is a matter of interpretation. *Memphis, etc., R. Co.* v. *Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. ed. 518; *Goodlett* v. *L. & N. R. Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. ed. 1230."

In disposing of this question the Circuit Court of Appeals for the Tenth Circuit, said:

"The constitutional power of the state to tax is limited only by its jurisdiction over the objects of its asserted power. *McCullough* v. *Maryland*, 4 Wheat. 316; *Shaffer* v. *Carter*, 252 U. S. 37; *Curry* v. *McCanless*, 307 U. S. 357. In the determination of the question whether the state has exceeded its sovereign jurisdiction in the exaction of a tax upon income, our decision does not depend 'upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.' *Shaffer* v. *Carter*, *supra*, *Curry* v. *McCanless*, *supra*; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. 'A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society * * * The fact that a tax is contingent upon events brought to pass without a state does not destroy the *nexus* between such a tax and transactions within a state for which the tax is an exaction.' *Wisconsin* v. *J. C. Penney Co.*, *supra*.

* * * * * * *

"The taxpayer cites and relies upon *Newport Company* v. *Wisconsin Tax Commission*, 261 N. W. 884, 100 A. L. R. 1204, Cert. denied 297 U. S. 720, 80 L. ed 1004. This case is directly in point and involved the constitutional power of the State of Wisconsin to tax the income from intangible properties of a foreign corporation, licensed to do business within the state when intangibles sought to be taxed were wholly without the boundaries of the state. The Wisconsin statute is not materially different from the one under consideration here. The Wisconsin court believed itself constrained by the decisions of the U. S. Supreme Court upon the constitutional question. Influenced by what it thought to be the controlling doctrine, it held that the State of Wisconsin could not 'by definition, construction, or other process, domesticate a person or corporation in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative to jurisdiction for purposes of taxation,' whether such power was conditioned upon the privilege of doing business in the state, or upon the exercise of the power to define and label business carried on or transacted within the state. But the Wisconsin court could see some merit in the contention that 'since taxes are thought to have some relation to the protection furnished to the taxpayer, there are more substantial grounds for giving to the state, where the principal business is conducted, jurisdiction to tax all its income, rather than the state of its domicile, to which, in many cases, its only real relation is that it has filed articles of incorporation there.'

"The Wisconsin court also thought itself constrained by constitutional inhibitions in *Wisconsin* v. *J. C. Penney Co., supra*, wherein the power of the state to tax the privilege of paying dividends out of income

derived from property located and business transacted in the state when such dividends were paid outside of the state to non-resident stockholders was challenged. But the Supreme Court of the United States did not find any constitutional objections to the exaction of the tax because the dividends were paid outside of the state to non-residents, and by its decision, the Supreme Court has made it abundantly clear that the Fourteenth Amendment places only 'extremely limited restrictions' upon the taxing power of a sovereign state. The line of demarcation between jurisdiction to tax, and the absence of it, is clearly discernible from modern authority in the consideration of the recent cases which have passed upon the asserted power of the states to tax intangible property.

* * * * * * *

"It cannot be said here that the acts performed by the non-resident corporation, under the privileges and protection granted by the state, are not directly related and inseparably associated with the realization of the income upon which the state has imposed a tax. It is clear that the state of Oklahoma did not transcend the limits of its jurisdiction, as fixed by the due process and equal protection clauses of the Constitution, by constituting the taxpayer a resident of the State of Oklahoma for income tax purposes" (Tr. 54-57).

If in its opinion the Circuit Court of Appeals placed a proper construction upon the authorities of this Court therein cited, they reach a conclusion contrary to that reached by the Supreme Court of Wisconsin in the case relied upon by petitioner, and would seem to be decisive of the issues here involved, and the writ should be denied.

Subdivision (b) of Section 5, *supra*, is not unconstitutional as applied to the facts of this case. The securities and the income derived therefrom had a taxable situs in this State irrespective of any statute fixing such situs.

Petitioner in this case was engaged in the investment business. This business it conducted in the State of Oklahoma or, as said by the Circuit Court of Appeals in its opinion in the above case, "the determinative act by which the capital of the corporation is invested in securities for the purpose of realization of income, originated in Oklahoma without which there would have been no income. The performance of these determinative acts were dependent upon the privilege afforded and the protection granted to the taxpayer by the State of Oklahoma."

Since the business of the petitoner was actually transacted at Tulsa, Oklahoma, the State has authority, power and jurisdiction to lay an income tax on the net income derived from such business.

This statement, we submit, is sustained by numerous opinions of this Court. The case of *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, is probably the leading case on this question. The gist of the opinion in that case is announced in paragraphs 1, 2 and 3, of the headnotes and is as follows:

> "Intangible property, such as accounts receivable and bank deposits, may have a situs for taxation by a State other than that of the owner's domicile through being part of a business localized in the taxing State.
>
> "The State in which intangible property belonging to a foreign corporation is thus localized cannot be denied constitutional power to tax it upon the ground

that, by legal fiction, the property is so attributable to the State by which the corporation was chartered as to vest in that State the sole power to tax it.

"So held where the corporation maintained in the State of its incorporation an office styled its 'principal' office, in which a duplicate stock ledger and records of capital stock transactions were kept, but actually conducted its business outside of that State.

"A Delaware manufacturing corporation conducted none of its business in that State but established its commercial domicile in West Virginia. There it maintained its general business offices where its general accounts were kept and in which its stockholders and directors held their meetings and from which its officers managed and controlled its operations, including what was done in its plants and sales offices in other states. All contracts of sale were subject to the approval of this main office and all invoices were payable there. It had bank deposits outside of West Virginia resulting from deposits by its West Virginia office of commercial paper received from customers, which deposits were used in meeting payrolls and in paying for materials, equipment, and maintenance and operating expenses in the course of its manufacturing activities but were drawn upon only by the West Virginia office or under its direction.

"*Held*, that the bank deposits and accounts receivable for goods made at the plants and sold through the sales offices were taxable by West Virginia."

In that case there was involved the right of the State of West Virginia to levy an ad valorem tax on accounts receivable belonging to the corporation and upon bank deposits made by it in banks in the State of New York. The

company was organized under the laws of the State of Delaware, and was a Delaware corporation. It was engaged in the manufacture and sale of steel. It did no manufacturing within the State of West Virginia and maintained no special sales office therein. It appears, however, in that case that the general business office of the corporation was located in Wheeling, West Virginia. The general books and accounting records were there kept. The chairman of the board of directors, president, treasurer and secretary there resided. Its stockholders' and directors' meetings were there held. Dividends were there declared and ordered distributed. However, the checks, after having been ordered drawn by the Wheeling office, were drawn and distributed by a dividend-disbursing agent who was a resident of and located in New York City.

It further appears in that case that the corporation maintained sales offices in various cities throughout the United States. Sales contracts were negotiated and orders taken by these offices, subject to acceptance or rejection at the Wheeling office. The manufacturing plants of the corporation were located in the State of Ohio. When sales were made at the various sales offices throughout the different states, invoices for the products sold were prepared and mailed to the office at Wheeling, where they were completed and mailed to the customers. The bills of lading and shipping notices were mailed direct to the customers from the individual plants. All invoices were payable in Wheeling, West Virginia, and when paid, the funds received were deposited in the New York banks. The expenses of conducting the business were, in the majority of

instances, paid by checks issued at Wheeling. All commercial accounts were likewise paid. The out-of-state business was, at all times, conducted under the direction and supervision of the managing office at Wheeling, West Virginia. If any money was expended by those in charge of the plants outside the State of West Virginia, it was expended under the specific direction and control of the general office at Wheeling.

Under the above state of facts it was contended by the taxpayer that since it was a resident of Delaware, that Delaware alone had the right to levy the tax on these accounts receivable and bank deposits. It was the contention of the State of West Virginia that these items had acquired a business situs in the State of West Virginia, and that West Virginia was, therefore, authorized to tax them. After considerable discussion and after citing various authorities sustaining the right of the non-domiciliary state to tax intangibles, when such intangibles had acquired a business situs therein, the court arrived at the conclusion that the intangibles therein involved had acquired a business situs in the State of West Virginia, and that that State, therefore, had a right to tax them, and, in so doing, said:

> "The constitutional authority of West Virginia to tax *the accounts receivable and bank deposits in question* cannot be denied upon the ground that they are taxable solely in Delaware. *The question is whether they should be deemed to be localized in West Virginia.*
>
> "Third: The Corporation established in West Virginia what has aptly been termed a 'commercial domicile.' It maintains its general business offices at

Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's counsel well says, 'the management functioned.' The Corporation has manufacturing plants and sales offices in other States. *But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government.*

"The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located are taxable by those states respectively. *The accounts receivable with which we are now concerned are the proceeds of contracts of sale.* While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. *In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken.* * * *

"Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made *but are attributable as choses in action to the place where they arise in the*

course of the business of making contracts of sale. We said, in *Virginia* v. *Imperial Coal Sales Co.* 293 U. S. 15, 20, that we were not able to perceive 'any sound reason for holding that the owner must have real estate or tangible property within the State in order to subject its intangible property within the State to taxation.'

"The tax is laid both on accounts receivable and deposits in banks. It appears that the Corporation has deposit accounts in several States. *The deposits outside West Virginia were made by sending from the Wheeling office to the various banks the original checks or drafts received by the Corporation from its customers.* From these deposit accounts the Corporation, by executive action at Wheeling, pays the amounts required for payrolls, materials, equipment, maintenance and operating expenses as these amounts become payable in the course of its operations in Ohio and other States. Checks and drafts on these bank accounts are drawn at Wheeling, except in connection with the payment of payrolls at certain manufacturing plants where payroll checks or orders are drawn against moneys sent to banks at such points for that express purpose and for meeting incidental items. The agreed statement shows that 'All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, *such immediate expenditure is made only under specific or general direction and control of the Wheeling office.*' The so-called 'money in bank' is not cash or physical property of the Corporation but is an indebtedness owing by the bank to the Corporation by virtue of the deposit account. *From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled.* In the light of this course of business as shown by the agreed statements of fact, we

find no sufficient basis for concluding that the bank accounts thus maintained and controlled *were properly attributable to the Corporation at any place other than at its general office at Wheeling. If there were any special circumstances by which any of these deposits could be deemed to have been localized elsewhere, they do not appear upon the present record.*

* * * * * * *

"Our conclusion is that appellant has failed to show that West Virginia in laying the tax has transcended the limits of its jurisdiction and thus deprived appellant of its property without due process of law."

See also in this connection *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234; *Smith* v. *Ajax Pipe Line Company*, 87 Fed. (2d) 567, and authorities cited and referred to in these opinions. We submit that the Circuit Court of Appeals in holding that petitioner's principal place of business was carried on and transacted at Tulsa, Oklahoma, is abundantly supported by these authorities. This being true, the income derived therefrom was subject to taxation by the State of Oklahoma. There is no material distinction between the facts here involved and the facts in the Wheeling case, *supra*. It is true, as stated by counsel for petitioner that the securities here involved were at all times held and kept outside of the State; that the interest derived from the notes and bonds in question, and the dividends derived from the stocks, were collected outside of the State, and the proceeds thereof kept on deposit in banks outside of the State, and that the actual transfer of the stocks sold took place outside of the State, and the proceeds

derived therefrom were deposited in banks outside of the State, but, as said by the Supreme Court in the Wheeling case, what was done at those places was determined and controlled from the center of authority at Tulsa, Oklahoma. The petitioner has made that the actual seat of its corporate business.

In the Wheeling case none of the products which were the subject of sale were manufactured in West Virginia. No sales actually took place in that State, but what took place in those states emanated from authority at Wheeling. The accounts arising out of the business were kept in West Virginia; the tax was assessed by West Virginia on these accounts. This Court sustained the tax.

In the instant case, all records in connection with petitioner's investment business are kept at Tulsa, Oklahoma; all contracts are there made. It is true that the collections of income from these securities are made outside the State, and a record made thereof by an agent of petitioner kept outside the State. Duplicates of these records are made and forwarded to Tulsa, Oklahoma, where all the permanent records of the petitioner are kept.

A large part of the income here involved arises out of profit derived from the sale of stocks. The contracts of such sales are all made and executed at Tulsa, Oklahoma; the income derived from these securities are collected and kept outside of the State under and by virtue of the authority emanating from Tulsa, Oklahoma. It will therefore be seen that there is no material distinction between the facts of this case and the facts in the Wheeling case.

The only distinction being that in the Wheeling case the taxpayer was conducting a commercial and industrial business, while in the instant case petitioner is engaged in the investment business. The basic facts upon which the Court based its conclusions in the Wheeling case are not essentially different from the basic facts in this case. We therefore submit that the conclusions reached by the Circuit Court of Appeals in the instant case is abundantly supported by the Wheeling case and other opinions of this Court.

The decisions of the Supreme Court of this State do not preclude the sustaining of the assessment here involved by the federal courts.

Petitioner contends that relevant decisions of the Supreme Court of this State preclude the Federal Court from construing the Oklahoma Income Tax Act of 1935 in such a manner as to attribute the State of Oklahoma a taxable situs as to the income here involved.

In support of this contention petitioner relies mainly on the case of *Chestnut Securities Company* v. *Oklahoma Tax Commission*, 173 Okla. 369, 48 Pac. (2d) 817. In that case there was involved the validity of a capital stock tax assessment, an assessment for the privilege of conducting business in the State of Oklahoma. The assessment was made under the provisions of Section 3, Chapter 195, Session Laws of 1933, which provides:

> "It shall be the duty of every corporation organized under the laws of this State and of every corporation organized under the laws of any other state, territory, District of Columbia, insular possession or any

foreign country, and other associations and organizations as enumerated in Section One (1) hereof, doing business in this State, to procure annually, from the Oklahoma Tax Commission, a license, authorizing the transaction of its business in this State.

"Each such corporation, association or organization shall pay for such license, a fee of one dollar per each one thousand dollars, or portion thereof, of the value of its capital stock employed in Oklahoma, as the value of capital stock employed in Oklahoma is defined in Section Five (5) hereof."

It will be noticed that under that Act the assessment was based on the value of the capital stock employed by the corporation in its business in Oklahoma. That Act levied a tax at the rate of $1.00 per thousand of the value of the capital stock employed in Oklahoma. In arriving at the assessment the Tax Commission, in valuing the capital stock employed by petitioner in Oklahoma, took into consideration the value of the securities here involved on the theory that they had acquired a local or business situs in the State. The Court held that the facts in that case were insufficient to show that the securities were used in connection with the business actually carried on in Oklahoma and, therefore, insufficient to establish a business situs. Some of the facts appearing in the instant case also appeared in that case but material facts have been shown and found by the trial court to exist, which did not exist in the case when presented to the Supreme Court of this State. In discussing the case, the State Court stated that, among other things, the evidence disclosed the following facts:

" * * * that it (petitioner) did not buy, sell or deal in stocks, and that the stocks, bonds, etc., held in Delaware and Pittsburgh were held by the company as an investment; that the condition of the securities held in Wilmington, Del., and Pittsburgh, Pa., so far as the control thereof is concerned, has not changed since the organization of the company up until the hearing before the Oklahoma Tax Commission; that the company paid a corporation license tax to the state of Delaware based on the values of the properties in question; *that the property was not used in the business of the plaintiff in this state; that the securities, stocks, cash, government bonds, etc., had been virtually the same since the date of the organization or incorporation of the company.*

* * * * * * *

"The corporation is a legal entity separate and distinct from the directors and officers. The residence of the latter cannot affect the domicile of the former, and we do not consider the residence of the directors a determining factor herein. Control of the intangible property is a factor to be considered, but such control must be so exercised that the intangible property is actually used or employed by the non-resident corporation in its business transacted in this state. There is evidence that these stocks, bonds, etc., were never used in the business of plaintiff transacted in this state. *It is true that the evidence also discloses that the plaintiff did not transact business at any other place but it is not inconceivable that at the time the plaintiff received its charter from the state of Delaware, or at least before it was licensed to do business in this state, it invested a part of its capital stock in the intangible properties which are sought to be taxed here and held them thereafter as an investment.* * * * "

It will be observed that the Supreme Court of this State pointed out in its opinion that, under the evidence as disclosed in that case, the corporation did not deal or traffic in any of the securities there involved; that it did not buy, sell or deal in stocks; that the securities, stocks and bonds then held by it had been virtually the same since the date of the organization or incorporation of the corporation. It also pointed out that the evidence did not show that the stocks and securities had been acquired by the corporation after it was qualified to do business in this State. It will, therefore, be observed that certain material facts, which the State Court held material to establish a business situs and which were lacking in that case, are present in this case.

There was involved in the state case the assessment of a tax for the fiscal year beginning July 1, 1932, and ending June 30, 1933. At that time the corporation had not dealt or trafficked in any of its securities; it had not, at that time, reinvested any of the income derived therefrom, but the securities, at the time the assessment was made, were the identical securities which the corporation had and held immediately after having qualified to do business in this State.

Suppose it had been shown in that case that the corporation at that time dealt and trafficked in the securities; suppose it had been shown that it acquired these securities subsequent to the time it qualified to do business in this State, and that all the negotiations and transactions incident to the acquiring of these securities took place in

the State; that the corporation had received income from these securities and had reinvested the same by purchasing other securities and that the contracts for the purchase thereof had been entered into and concluded in the State; that it had sold large blocks of stock and that the contracts of sale had been entered into and executed in Oklahoma, would the Court then have said that these securities were not used in connection with business conducted in Oklahoma? We apprehend not.

In the instant case it is shown that such transactions were had in connection with these securities and that these transactions all took place at Tulsa, Oklahoma. Moreover, the Supreme Court did not hold in that case that petitioner's principal business was not transacted and carried on in Oklahoma but, on the contrary, it held the evidence disclosed that it did not transact any business at any other place except in Oklahoma.

The income acquired by petitioner in the instant case certainly resulted from the transaction of business at some place, and if, as stated by the State Supreme Court in the Chestnut Securities case, *supra*, it transacted business at no other place than in the State of Oklahoma, certainly the State had a right to tax such income.

We submit that the facts are materially different in the instant case than in the case as presented to the Supreme Court of the State. Therefore, the mere fact that the Supreme Court in that case, under the taxing act there construed and under the evidence there produced, held that the securities had not acquired a business situs for the purpose of assessing a corporation license tax, does not

preclude this Court, or any Federal Court, when construing a different taxing act under a different state of facts, from arriving at a different conclusion.

The facts in the instant case bring the case within the rule announced by the Supreme Court of this State in the case of *State* v. *Atlantic Producing Oil Company*, 174 Okla. 61, 49 Pac. (2d) 534, rather than within the rule announced in the Chestnut Securities case, *supra*. In that case the following rule is announced in paragraph 2 of the syllabus:

> "Intangible personal property consisting of accounts receivable in this State, arising from business operations carried on in this State, owned by a foreign corporation engaged in business in this and other states, may have or acquire a business situs in this State, so as to be subject to ad valorem taxation in this State."

We submit that nothing that was said by the Supreme Court of the State in the Chestnut Securities case, *supra*, or in any other decision, precluded the Circuit Court of Appeals for the Tenth Circuit, or any other Federal Court, from exercising its own independent judgment as to the validity of the assessment here involved.

CONCLUSION

In conclusion we summarize our contentions as follows:

(1) The record clearly establishes that petitioner's principal business was transacted and carried on in the City of Tulsa, Oklahoma, therefore, under the provisions

of subdivision (b) of Section 5 of the Income Tax Act of 1935, it must, for income tax purpose, be deemed to be a resident corporation and that its income is taxable as such.

(2) That, as applied to the facts of the instant case, said subdivision (b) is not unconstitutional.

(3) That the income here involved had a taxable situs in the State of Oklahoma, irrespective of any statutory enactment fixing such situs.

(4) That the decisions of the Supreme Court of this State did not preclude the Circuit Court of Appeals for the Tenth Circuit from exercising its own independent judgment as to the validity of the assessment here involved.

(5) That in sustaining the assessment, the Circuit Court of Appeals for the Tenth Circuit followed and applied applicable decisions of this Court, and that the writ should, therefore, be denied.

Respectfully submitted,

F. M. DUDLEY,
Counsel for Respondent,
A. L. HERR,
C. D. STINCHECUM,
Of Counsel.

Address:
State Capitol,
Oklahoma City, Oklahoma.

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